FILED
JAN 26 1998
CLERK

No. 97-962

IN THE

Supreme Court of the United States

OCTOBER TERM 1997

SOLID WASTE TRANSFER & RECYCLING, INC.,

Petitioner,

vs.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION; THE COUNTY OF ESSEX, NEW JERSEY; THE CITY OF NEWARK, NEW JERSEY; THE NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE, DIVISION OF RATEPAYER ADVOCATE and WASTE MANAGEMENT OF NEW JERSEY,

Respondents..

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

BRIEF ON BEHALF OF RESPONDENT CITY OF NEWARK IN OPPOSITION

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17 pp

QUESTION PRESENTED

Does the Fifth Amendment and Section 1 of the Fourteenth Amendment require that a State Utility Regulatory Agency, accept an automatic rate escalator clause based solely on the Consumer Price Index (CPI) contained in a contract for solid waste disposal service where the solid waste utility fails to present evidence demonstrating the reasonableness of linking changes in solid waste disposal costs to changes in the CPI and also fails to present adequate cost of service data necessary to establish an alternative rate in violation of well established utility policy and law?

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BRIEF ON BEHALF OF THE CITY OF NEWARK IN OPPOSITION

Respondent, the City of Newark ("Newark") respectfully requests that this Court deny the Petition for a Writ of Certiorari filed by petitioner, Solid Waste Transfer & Recycling, Inc. ("SWTR"), seeking review of a decision by the Superior Court of New Jersey, Appellate Division reported at 299 *N.J. Super. 577, 691 A.2d 846 (App. Div. 1997).*

COUNTERSTATEMENT OF CASE

In December 1986, the County of Essex, State of New Jersey (County) issued a "Solicitation of Interest," seeking proposals for the establishment of one or more solid waste transfer stations in the County (Pa5).[1] The solicitation advised all potentially interested parties that any proposed transfer station would require approval of rates or tariffs by the Board of Public Utilities, (BPU) approval under the Solid Waste Management Act, ***N.J.S.A.*** 13:1E-1, ***et seq***. as well as Department of Environmental Protection (Pa6).

Negotiations ensued, and on July 1, 1987, the County and Petitioner, Solid Waste Transfer & Recycling (SWTR) executed the Transfer Station Contract. SWTR's contract provided that it was to be governed and construed pursuant to the laws of New Jersey. The laws of New Jersey, at the time the Contract was executed, provided BPU with plenary authority to review the reasonableness of solid waste disposal rates. ***See N.J.S.A.*** 48:2-13. ***N.J.S.A.*** 48:13A-4; ***N.J.S.A.*** 48:13A-7.

More specifically, the contract also provided that all of its terms were subject to BPU approval. Article 2.7 of the contract, captioned, "Agreement Conditioned Upon BPU approval," stated:

> The parties hereto agree that the rights, duties and obligations imposed upon them herein are subject to

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[1] "Pa" refers to the Appendix filed by SWTR with its Petition for Writ of Certiorari.

> and conditioned upon acceptance and approval of this Agreement by the BPU. Refusal of the BPU to accept and approve this Agreement shall be deemed to be an Uncontrollable Event . . . for purposes of determining the County's liability . . . (CA5).[2]

On July 16, 1987, Essex County filed a petition with BPU seeking approval of the Transfer Station Contracts and of the rate increases necessitated by the contract terms. The BPU, after holding an expedited hearing, provisionally granted the County's petition by Order dated July 31, 1987. The BPU prefaced its order by noting the "emergency nature" of the petition, and on that basis accepted the County's contracts with Petitioner and approved the "interim, initial, emergent tariff" rates proposed by the County. (Pa6 to Pa7)

In February 1988, the County filed a supplemental petition seeking BPU's approval of the County's "interim disposal tariff rates." Several municipalities, including the City of Newark, opposed this petition, which was thereafter transferred to the Office of Administrative Law ("OAL") as a contested case. SWTR was listed as a "co-applicant" with the County in the caption of the referred case.

The matter proceeded to hearing before the Administrative Law Judge in November 1989. SWTR principally relied upon proofs designed to show that its contract was a competitively negotiated, arm's length agreement (Aa881).

SWTR chose to argue that its rates were reasonable because they were part and parcel of a competitively negotiated arms length agreement.

The ALJ issued her Initial Decision on December 26, 1990. The ALJ, in her recommended disposition, found that the Transfer Station Contracts, although arising out of a solid waste emergency in Essex County, were "the result of

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[2] "Ca" refers to the Appendix filed by the Couty of Essex in its Opposition tothe Petition for Writ of Certiorari.

arms-length negotiations in a competitive market.". With respect to the standard of proof, the ALJ opined that a traditional "rate base/rate of return approach" to assessing the reasonableness of SWTR's rates was neither required, nor appropriate, and expressly declined to engage in any such evaluation. The ALJ therefore engaged in no analysis of the reasonableness, from a traditional ratemaking standpoint, of the rate increases generated by the CPI escalator clause. (Pa146 to Pa168)

On review of the full administrative record, BPU, in a final decision dated August 8, 1991, reached a substantially different conclusion from the ALJ. The BPU found that the Contracts were essentially a product of emergent circumstances, and concluded that the reasonableness of SWTR's rates needed to be assessed on the basis of a "traditional ratemaking analysis". The BPU stated:

> [W]e reject the ALJ's finding to the effect that such analysis need not be conducted because the contracts in question were negotiated on a competitive basis. We find that the contracts and the resulting rates were not competitively negotiated. (Pa47)

With respect to the CPI escalator clause, BPU found that SWTR had failed to carry its burden of proving the reasonableness of the rate increases that the clause would generate. In this regard, BPU noted that the components of the CPI did not have a close correlation to the major components of transfer station costs, and that SWTR had failed to present any evidence to demonstrate a nexus between anticipated changes in transfer station operating costs and the CPI. Although ruling that SWTR was therefore not entitled to recover the CPI-based rate increases it was seeking, in all other respects BPU upheld the previously approved "interim rates." (Pa49 to Pa52)

SWTR thereafter sought reconsideration of BPU's decision. During the pendency of that motion, BPU's regulatory functions were merged into the Department of Environmental Protection, to form a new department, the Department of

Environmental Protection and Energy ("DEPE"). (Pa3) DEPE granted SWTR's motion for reconsideration.

After further briefing and argument, DEPE, on August 19, 1994, issued its decision on the merits of SWTR's motion for reconsideration. In the decision, DEPE Commissioner Shinn again denied the CPI-based increases sought by SWTR, and stated:

> I am in complete agreement with the Board's rejection of the CPI-based automatic increases sought by WMNJ and SWTR.
>
> * * *
>
> Only when an automatic adjustment clause has been specially selected to reflect the type of costs under review, has its use been permitted . . . [T]he CPI clauses here (1) were not tailored in any way to reflect transfer station costs and (2) were not subject to any further ratemaking review or analysis.
>
> . . . [T]he burden of proving every aspect of a rate's reasonableness is upon the utility . . . [R]equiring a solid waste utility to demonstrate a "nexus" between transfer station costs and the CPI . . . does no more than to hold WMNJ and SWTR to their burden of proving the reasonableness of their proposed rate . . . WMNJ and SWTR have failed to create a record supporting the reasonableness of automatic CPI-based increases (Pa33 to Pa35)

On April 10, 1997, the Superior Court, Appellate Division issued its ruling affirming the Department's rate determination in its entirety. (Pa2)

On the issue of the rejection of SWTR's automatic CPI-based escalator clause, the Court, stated:

> SWTR knew or should have known from the outset in 1987 that [it was a public entity] and would function and be treated as such.

* * *

> It is patently clear that the Board, and also the [Department] when it succeeded to the regulatory powers of the Board, had the authority to eliminate the applicability of the CPI-based automatic escalator clause of each contract. Each contract was subject to modification in the exercise of the overriding authority of the Board to act in the public interest. (Pa19 to Pa20)

Quoting from *In re Application of Saddle River, 71 N.J. 14, 362 A.2d 552 (1976),* the Court further emphasized that even municipal solid waste contracts arrived at by means of competitive public bidding are nevertheless subject to modification in the public interest. Finally, the Court noted that both transfer station operating contracts:

> contained language which required them to be construed in accordance with and be governed by the laws of this State and we are satisfied that both contracts were entered into subject to the acceptance and approval of the Board. A specific clause to that latter effect is contained in the SWTR contract. (Pa19)

Rejecting SWTR's objections to the Department's requirement that a "nexus" be shown between CPI cost components and those commonly associated with transfer station operations, the Court remarked:

> A meaningful 'nexus' or connection must exist between the underlying cost factors (food, household good, and electronic equipment) built into the CPI and the underlying cost factors (labor, transportation, depreciation, landfill and disposal costs) built into transfer station operation . . . so that the resultant rate after applying the CPI factor can be deemed just and reasonable. (Pa21)

Following issuance of the Court's opinion, a Notice of Petition for Certification was filed by SWTR with the New

Jersey State Supreme Court of New Jersey on April 29, 1997. That petition was denied on September 8, 1997. (Pa1)

ARGUMENT

PETITIONER'S CLAIM OF AN UNCONSTITUTIONAL TAKING OF PROPERTY IS WITHOUT MERIT, AS THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY PROPERLY APPLIED LONGSTANDING PRINCIPLES OF UTILITY RATE MAKING IN REJECTION OF PETITIONER'S PROPOSED SOLID WASTE UTILITY RATES.

I. SUMMARY OF ARGUMENT

Petitioner would urge this Court to believe that the State Board of Public Utilities and the Department of Environmental Protection rejected the CPI provision contained in its Transfer Station Contract due to "arbitrary political influence of Newark, not valid policy". (Pb16)[3] This "arbitrary political influence" was nothing more than a political subdivision of the State of New Jersey exercising its legal rights to participate in a matter which had a direct bearing on the taxpayers of the City of Newark.

Petitioner's attempt to lay their problems in the "political" domain should not be entertained by the court. It was Petitioners failure to support the reasonableness of the proposed CPI-based rate adjustment that lead to the proper rejection of those adjustments. There were no constitutional violations in the decisions of the rate making Agencies or the Appellate review court.

Since the Appellate Division decision is based on well settled law, the Petition for Certiorari should be denied. This is especially true since none of the issues addressed by the reviewing court rise to the level of public importance which warrants this Court's review.

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[3] "Pb" refers to the brief filed by SWTR to support its Petition for Writ of Certiorari.

A. THE AGENCY DECISION DENYING APPROVAL OF THE CPI INCREASES SOUGHT BY SWTR WERE WELL SUPPORTED BY THE RECORD AND ADMINISTRATIVE PRECEDENTS AND AS SUCH DID NOT DEPRIVE PETITIONERS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

The burden lies with the utility seeking approval of its rates to demonstrate by competent evidence the reasonableness of its rates.

It is the general rule that an increase in the rates charged by the public utility must be supported by specific evidence of the known and measurable costs incurred in order for the public utility to show the reasonableness of the new rates. In ***Re Commonwealth Water Co.***, 45 PUR 3rd 374 (N.J.B.P.U. 1962) (inflation and its effect on the return allowance require precise findings by the Board in a rate proceeding). Proof of actual expenses is necessary to insure that rates are cost-based. ***N.J.A.C.*** 14:1-6.16A. However, throughout the presentation of its cases, SWTR has failed to produce evidence which would prove that their costs and expenses have increased in an amount equal to the CPI, let alone to the 106% of the CPI allowed in the contract. The CPI is just a general index of many products, including products such as produce and clothing which are of little relevance to any cost increase incurred in operating a transfer station. SWTR has failed to meet its statutory burden of proof and thus was not entitled to any increase based upon the CPI.

B. AS A MATTER OF REGULATORY AUTHORITY AND THE EXPRESS TERMS OF THE CONTRACT, SWTR WAS NOT ENTITLED TO AUTOMATIC INCREASE BASED UPON THE CPI.

The BPU has been vehement in its rejection of the CPI as a viable factor in determining just and reasonable rates. The Board has "consistently refused to recognize increases associated with general inflationary factors." ***Petition of***

Elizabethtown Water Co., 11 ***N.J.A.R.*** 303, 337 (O.A.L. 1984), ***aff'd BPU Decision and Order***, No. 8312-1072 (1984), ***rev'd on other grounds***, 205 ***N.J. Super.*** 528 (App. Div. 1985), ***aff'd as modified***, 107 ***N.J.*** 440 (1987). ***Re Jersey Central Power and Light Co.***, 85 *N.J.* 520, (1981); ***Re Commonwealth Water Co.***, 7 PUR 4th 456 (N.J.B.P.U. 1974). The automatic increases sought by the Petitioner were based upon the Consumer Price Index, a general inflationary factor which the BPU has consistently refused to recognize as a valid basis for an increase in a public utility's rate.

For example, in ***Elizabethtown Water***, above, the BPU affirmed an OAL decision disallowing a general four percent inflationary increase in the calculation of expenses, endorsing the ALJ's conclusion that such a disallowance was "consistent with prior Board policy which does not recognize recovery of inflation related adjustments.": 11 ***N.J.A.R.*** at 338. Likewise, in ***Re Jersey Central Power and Light Co.***, above, the Board rejected the petitioner's use of the CPI in its update of the future costs of nuclear plant decommissioning for the Oyster Creek nuclear generation facility and the Saxton experimental station. The BPU agreed with the recommendation of staff and rate counsel that "the CPI did not accurately reflect the true cost of decommissioning because it does not truly quantify petitioner's projected labor costs." 65 PUR 4th at 178. The BPU believed that while more specific indices are helpful in determining costs, the CPI is too general and thus fails to give an accurate reflection of increases in costs. ***See Re Commonwealth Water Co.***, 7 PUR 4th at 467. ***See also Re Adjustment Clause in Telephone Rate Schedules***, 3 PUR 4th 298, 306 (N.J.B.P.U. 1973) ***aff'd as modified*** 66 ***N.J.*** 476 (1975) (the BPU considered an adjustment clause for "other expenses" pegged to fifty percent of the increase in the CPI and held that the CPI was ***not*** a proper index upon which to base such an increase).

The BPU's interim decision and order ***In The Matter of The Application of SES Gloucester Company*** (BPU Docket No. SE-85100984, October 21, 1987) should not be relied upon because it is clearly distinguishable. There, the Board

approved a twenty-year utility rate formula for a resource recovery facility that included a formula providing for annual adjustments based upon changes to the Producer Price Index ("PPI"). However, the decision (at p. 12) states that increases are subject to further order of the Board, and thus the Board had retained its discretion to disallow any adjustment which were not just and reasonable.

In contrast, SWTR's contracts with Essex County called for CPI, not PPI, adjustments, for short-term, not long-term rates. Both contracts also provide that the CPI increase apply ***automatically***. Resource recovery rates are distinguishable from the rates of other types of utilities. Thus, ***SES Gloucester*** is limited to its facts and cannot apply in this situation.

Other jurisdictions likewise have rejected increases in rates tied to the CPI. In ***Re Otter Tail Power Co.***, 21 PUR 4th 254 (S.D.P.U.C. 1977), the South Dakota Public Utility Commission rejected an adjustment to increase operating costs for rate-making purposes linked to the CPI. The Commission found that the CPI "utilized by company in determining its inflation adjustment is irrelevant and inapplicable to the inflation company may incur in the future." ***Re Otter Tail Power Co.*** at 273. In declining to allow this increase based on the CPI, the Commission held:

> the effects of inflation on a company do not in any reasonably accurate manner parallel those contained in [the CPI]. The Commission finds that it is improper to allow for any expenses which are merely designed to raise the revenue requirement of company without adequate justification and support in the record. The Commission finds that company's proposed inflation adjustment constitute exactly such an unjustified item. Otter Tail Power Co. at 274.

Finally, SWTR's contention that it is entitled to this CPI increase based upon their contract entered into with Essex County to operate the transfer station is without merit. As noted, it is long-standing New Jersey law that a contract

between a subdivision of the State and a public utility "is a contract subject to the State's sovereign power over rates, and when, as in this case, the state through its Board of Public Utility Commissioners exercises it sovereignty over rates, the contract rights of the parties must yield." ***N.J. Bell Telephone Company v. West Orange***, 188 ***N.J. Super***. 455, 460 (App. Div. 1982), quoting ***Atlantic Coast Electric Rail Co. v. Public Utility Comm'rs. Bd.***, 92 N.J.L. 168, 173 (E. & A. 1918), ***app.dism.*** 254 U.S. 660 (1920). ***See In re Application of Saddle River, supra*** 71 N.J. at 23.

Additionally, Petitioner was fully aware, when it executed the Transfer Station Contract, of the existence of the State's jurisdiction and authority to amend the contract in question. ***In re Application of Saddle River, 71 N.J. 14, 23, 362 A.2d 552 (1976); N.J.S.A. 48:13A-7*** (where BPU determines that rates or charges received for solid waste disposal services are excessive, "it may order the person charging such excessive rates or charges to make an adjustment in the tariff or contract to a sum which shall result in just and reasonable rates or charges.") Hence, petitioner's assertion that is was denied the benefit of its contract because BPU rejected the CPI provision after petitioner performed under the contract utterly ignores the obvious and compelling fact that the Transfer Station Contract was entered into on an interim, emergent basis subject to BPU approval.

C. THE DECISIONS OF THE AGENCIES DO NOT CONSTITUTE OR EFFECTUATE A "TAKING" OF SWTR'S PROPERTY.

Although unable to show, or even credibly assert, that it suffered financially under the agency decisions below, SWTR nonetheless characterizes the denial of its CPI increases as "confiscatory".

While a governmentally fixed rate confining a public utility's return from operations to an amount below the point of confiscations violates due process, ***Denver Union Stock Yard Co. v. United States, 304 U.S. 470, 475*** (1938), it is also well settled that a company operating in a heavily regulated field

such as the solid waste indutry need only "be permitted a return sufficient to assure its financial health." ***State Farm Mutual Automobile Ins. Co. v. State***, *124 N.J. 32, 48, 50, 590, A.2d 191 (1991).* Similarly, it is an established principle of public utility law that "[r]egulation may, consistently with the Constitution, limit stringently the return recovered on investment, for investor's interests provide only one of the variable in the constitutional calculation of reasonableness." ***Permian Basin Area Rate Cases***, *390 U.S. 747, 769 (1968), (citing Convington & Lexington Turnpike Co. v. Sandford, 164 U.S. 578, 17 S. Ct. 198 (19).*

In this case, the record well supports BPU's, DEPE's, and the Appellate Division's findings that the CPI increases sought by the Petitioner were unreasonable and excessive.

The truth is the Petitioner took a calculated business risk and could not, in the final analysis, support by any credible evidence the exorbitant rate increases it was seeking.

CONCLUSION

Petitioner knows full well when it entered into the Transfer Station Contract that it was not final. Petitioner knew that there were to be reviews by the BPU & DEPE. Petitioner knew that they would have to present credible evidence to support the CPI clause in the contract. Yet having known this, the Petitioner now complains that its Constitutional rights have been violated. The fact of the matter is that the Petitioner could not and did not show the reasonableness of the CPI increase. The Petitioner utterly failed to demonstrate any nexus or relationship between the operating costs of the Transfer Station and the CPI based escalator clause in the Contract. Accordingly, Respondent City of Newark respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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